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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

— — —

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

Case No. 21-12193

v.

Hon. Matthew F. Leitman

ROBERT SAMUEL SHUMAKE, JR.,

Defendant.

(Hearing conducted
virtually using Zoom
Video Communications)

/

MOTION TO DISMISS

BEFORE THE HONORABLE MATTHEW F. LEITMAN
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Friday, June 9, 2023

APPEARANCES:

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TABLE OF CONTENTS

<u>MATTER</u>	<u>PAGE</u>
MOTION TO DISMISS	
Motion by Mr. Uretsky.....	4
Reply by Mr. Birkenheier.....	14
Ruling by the Court.....	20

1 Detroit, Michigan (*Remote proceedings*)

2 Friday, June 9, 2023

3 at about 2:01 p.m.

4 — — —

5 (Court and Counsel present via Zoom Video
6 Communications.)

7 THE LAW CLERK: The United States District Court
8 for the Eastern District of Michigan is now in session, the
9 Honorable Matthew F. Leitman, United States District Judge,
10 presiding.

11 The Court calls Case No. 21-12193, United States
12 Securities and Exchange Commission v. Shumake, Jr., et al.

13 Counsel, please state your appearances for the
14 record.

15 MR. BIRKENHEIER: Good morning, Your Honor.
16 John Birkenheier for the Securities and Exchange Commission.

17 THE COURT: Good morning.

18 MR. KOHN: Good morning, Your Honor. Jerrold Kohn
19 for the Securities and Exchange Commission.

20 THE COURT: Good morning.

21 MR. ROLAND: Good morning, Your Honor.
22 Donta Roldan for the Securities and Exchange Commission.

23 THE COURT: Good morning.

24 MR. URETSKY: Good morning, Your Honor.
25 John Uretsky for Robert Shumake, one of the defendants.

1 THE COURT: Good morning. Thanks to all of you
2 joining me. I appreciate your time this morning.

3 We're here for a hearing on the motion that
4 Mr. Uretsky filed to dismiss the claims against Mr. Shumake.
5 And what I'd like to do is begin with Mr. Uretsky, it is his
6 motion. And could I ask the rest of you to please mute your
7 system, and, Mr. Uretsky, would you please unmute?

8 Mr. Uretsky, I don't know that you have appeared
9 before me before, but what I like to do when I'm hearing a
10 motion is start with my questions, and then once I get
11 through my questions, I'd be pleased to hear any other points
12 that you would like to make. Does that work for you?

13 MR. URETSKY: That's so much better than what some
14 other judges have done, so, yes, go for it.

15 THE COURT: Thank you.

16 Mr. Uretsky, when I read your brief in support of
17 your motion, you say in your preliminary statement that while
18 you're obligated to take the facts as alleged in the
19 complaint, you kind of want to take a step back and let me
20 know what you believe really happened, and in your view,
21 Mr. Shumake was an outside, unaffiliated vendor to who you
22 believe are the bad actors, if there are any bad actors in
23 this case. And I certainly understand your desire to share
24 your view of the facts with me.

25 In your preliminary statement, you say -- these are

1 my words now -- you are essentially going to take a short
2 digression, tell me your view of the facts and then come back
3 to the SEC's view of the facts. And on at least some of the
4 points that you made, I was concerned that you didn't quite
5 make it all the way back to the SEC's investigation of the
6 facts and you were pressing the motion on your versions of
7 the facts, and let me try to give some specifics and see if
8 you can share your thoughts with me.

9 So, for instance, on page 6 of your brief you have
10 a sentence -- this is Docket No. 14, pageID.79, you have the
11 following sentence, "There is no allegation Shumake had any
12 control over money in connection with the offerings in
13 question."

14 And I'm just going to refer you to a couple of the
15 paragraphs. Paragraph 43E alleges that Mr. Shumake gave
16 directions to Birch as to the disbursement of investor money
17 from the bank accounts, and paragraph 45 alleges that Birch
18 and Shumake diverted the investors' money.

19 Isn't it fair to say that while you may ultimately
20 disagree as a factual matter, the SEC is alleging, in this
21 complaint, that he exercised control over money by directing
22 Birch to take certain actions with it, and by personally
23 participating in the diversion of money?

24 MR. URETSKY: Yes, Your Honor. However,
25 it's -- obviously, I probably over characterized, as you have

1 pointed out. However, what you will notice is that
2 throughout, at no point is Mr. Shumake ever solely
3 responsible for anything. And then if you read into the more
4 detailed allegations, you will see that each time, there is
5 effectively the other co-person or co-persons is an officer
6 or director or actual control person. It is our contention
7 that under the law, when you do have an allegation where
8 there are multiple people and one is, even according to these
9 allegations, you know, a consultant or a vendor or however
10 you see the SEC's characterizations as characterizing
11 Mr. Shumake, when combined with, for example, Co-defendant
12 Birch or Co-defendant Jackson, and you see the results that
13 they have gotten against those, that because of those
14 individuals' respective position within the company, as
15 compared with Mr. Shumake's, that they can never be
16 considered to be co-equals. As a result, what we are
17 arguing, perhaps I went too strong in my characterization, is
18 that there's no sole allegation where it is merely the
19 allegation is that it is all controlled by Mr. Shumake. It
20 is also with, for example, as you pointed out -- I'm sorry,
21 Ms. Birch.

22 THE COURT: I mean, is there any requirement in the
23 statute or the case law that his control over money is only
24 relevant or actionable if it was his sole control?

25 MR. URETSKY: It's not so much the control of the

1 money. I think there what we were looking at -- obviously,
2 in that sentence, it was control of the money. It is the
3 section on making the alleged misstatements. There is law,
4 if you go to the alleged misstatement section, I realize I'm
5 now diverting from your question about the money. It's not
6 as clear on the money, no, Your Honor.

7 THE COURT: Okay. And rest assured, I'm going to
8 have plenty of questions for your colleagues on the other
9 side about the 10(b)(5) claim, but I just want to focus, for
10 a minute, on your argument.

11 So another sentence in your papers that I wanted to
12 ask about is on the next page of your brief, page 7, this is
13 docket No. 14, pageID.80, you say, "Mr. Shumake never had any
14 control over the company nor did he have access to any of the
15 company's financial or proprietary business material."

16 And, again, the allegation in paragraph 43 is that
17 he co-managed Trans Atlantic Real Estate with Birch and was
18 extensively involved with the strategic decisions, and then
19 they give some specific factual allegations in the
20 subparagraphs.

21 Now, at summary judgment and at trial, I understand
22 you're going to want to say that those allegations, the facts
23 that they point out, are, in your view, consistent with your
24 theory that he was nothing more than an outside consultant,
25 but it seems to me that's not the only reasonable way to view

1 these allegations. I mean, the SEC does seem to allege that,
2 at least along with Birch, he did have some control over the
3 company. Isn't that, at least, what they allege?

4 MR. URETSKY: In that section, yes, Your Honor. If
5 you review the totality of it, it seems that they're trying
6 to have their cake and eat it, too, and what they are
7 attempting to do is say, hey, Nicole Birch, she served as
8 CEO, she was the sole director of Transatlantic and Bangi as
9 well. She facilitated the payment of the money from
10 Trans Atlantic to herself and HP Associates. There is a
11 similar section on Jackson.

12 And once you have somebody with that amount of
13 control, I don't know that -- obviously, 43 says what it
14 says, but you can't just say co-managed, when you actually
15 have somebody who very easily had all the power and another
16 person who, you know, I guess, at most, could give advice.

17 THE COURT: Look, isn't the SEC's fundamental
18 theory here, that the entity itself -- this whole thing is a
19 sham, it's not a real company. This is their theory, and I
20 understand you vehemently disagree. But isn't the theory of
21 this action that the whole damn thing is a sham; it is set up
22 at a post-office box in Grosse Pointe, Michigan, she's in
23 Georgia. And while she's nominally the person with the
24 power, if you look on paper, their theory that they pled here
25 is that every step of the way, this is a plan between the two

1 of them to set up a company that they going to use to commit
2 this fraud and obtain the money. And isn't that at least
3 enough at the pleading stage, separate and apart from the
4 10(b) (5), to state the claims in this complaint?

5 MR. URETSKY: I see where you're going with that,
6 Your Honor, but I do believe there is a distinction. That is
7 their theory in the aggregate, you are absolutely correct.
8 And you are correct, as I said before, they are trying to
9 have their cake and eat it, too. I think they -- and they
10 have already succeeded. They are completely in favor of, you
11 know, taking the position that this was Ms. Birch, that this
12 was Mr. Jackson. That it may be a fraud, a sham, all of
13 those things, but that it is Birch's fraud and sham, it is
14 Jackson's fraud and sham.

15 THE COURT: Can I interrupt you? Why do you say
16 the SEC is -- that there's an inconsistency in their
17 insistence that Birch and Jackson are liable? Why isn't the
18 right way to read their theory that Birch and Jackson are
19 liable because each of them participated in a plan with
20 Shumake, and so there's nothing inconsistent, it doesn't have
21 to be one or the other, it could be both, and we, the SEC,
22 say it is both.

23 MR. URETSKY: But here's why, Your Honor. Those
24 individuals actually had control of the company and
25 Mr. Shumake didn't. The difference is, if you will allow me

1 to use us, right here, as an example. I have the opportunity
2 and platform similar to Mr. Shumake here, to try to persuade
3 you to find in favor of Mr. Shumake, to try to agree with me
4 on what I would like you to do to see my viewpoint.

5 Mr. Shumake also had that opportunity; he had that platform,
6 much as I do here, but I can't force you to do anything. You
7 are completely in control. Similarly --

8 THE COURT: But, look, isn't the right analogy
9 here, the SEC -- if you were to make a correct analogy, at
10 least according to the SEC, it would be that before this
11 hearing, you and I had a separate meeting and we agreed that
12 I was going to rule in your favor and this whole exercise is
13 a sham, and then I rule in your favor and each of us get
14 something out of it. Of course, that's not what happened,
15 but isn't that what the -- isn't that the right analogy
16 between what the SEC says happened in this case and what's
17 happening today?

18 MR. URETSKY: Yes. However, if so -- and again
19 thank you for pointing out that's not what happened -- I
20 still think that the responsibility for that would fall on
21 you being the judge, as opposed to me being the guy simply
22 trying to make that happen.

23 THE COURT: So your theory is, if in the next case,
24 I conspire with a litigant to fix a case, the litigant has no
25 responsibility and it's all on me?

1 MR. URETSKY: It's different in the context -- my
2 analogy is only going to work so far, but, yes, that is our
3 theory, as analogous here. I believe it is slightly
4 different in the public markets, between a vendor and a
5 control person, but, yes, using my theory, that's correct.

6 THE COURT: Okay. One other question I want to
7 ask, Mr. Uretsky. You say on page 15 of your brief, this is
8 Docket No. 14, pageID.88, that the SEC fails to plead any
9 facts showing that Mr. Shumake may have had a motive to
10 engage in the fraud.

11 Why isn't the motive here two-fold; he wants to
12 make money and he understands that if there's complete
13 disclosure, people would -- would be less likely to invest.
14 More specifically, what I understand the SEC to be alleging
15 is what a complete disclosure here would have looked like,
16 would have said, among other things, Shumake is involved in
17 extensively managing the company, he's going to be engaging
18 in transactions with the company, and oh, by the way, he's
19 personally been convicted of misdemeanors and the company
20 that he ran was convicted of felony offenses. And so the
21 idea is, if he disclosed all of that, the public would have
22 been substantially less likely to invest. Isn't that a
23 plausible allegation of motive?

24 MR. URETSKY: I don't believe so, Your Honor, and
25 here's why. The amount that Mr. Shumake was allegedly, I do

1 want to point out allegedly, because we disagree with even
2 that much, but the amount he was getting, according to the
3 complaint, is the amount that he was entitled to just as his,
4 you know, vendor compensation for his marketing services. In
5 other words, according to the allegations, he did make money,
6 but there's no incentive salesman stake, so to speak, there's
7 no more than he was getting in any event. If there's an
8 allegation, I'm missing it where there is some sort of an
9 incentive base to it. I see your pointing out that there
10 would have been more money coming in as a result, but as I
11 see it, that goes to the others, his amount was effectively
12 no different.

13 THE COURT: Let me ask you, I mean, the complaint
14 itself -- the notion that he's an outside vendor who is
15 actually providing legitimate services and being paid for
16 legitimate services, I certainly understand that's your
17 theory and perhaps the facts will bear that out, but unless
18 I'm missing something, that whole concept doesn't appear in
19 the complaint. The complaint alleges he set up a sham and he
20 got money. And so on the complaint, the motive would be,
21 even if he got a small amount of money, the idea is he
22 wouldn't have gotten any if he had told the truth in the
23 registrations.

24 MR. URETSKY: I -- I -- again, you make a very good
25 point, Your Honor. I see it. I -- we would contend it's the

1 relative discrepancy, it's the "would he make more but for"
2 text, and I don't see that's alleged. I don't see where it
3 says that he would have made more or less, but for this
4 alleged activity.

5 THE COURT: Okay. Those are the questions that I
6 have for you. I appreciate your answers.

7 What else, if anything, would you like to share
8 with me? And I certainly don't mean to suggest that you have
9 to say more, but I would be pleased to listen if there is any
10 other points that you would like to emphasize.

11 MR. URETSKY: I can tell already, Your Honor, that
12 you have read this very carefully, unfortunately for me, and
13 I guess the main points, which I'm sure you are already
14 familiar with, that I just want to hit, to say that I did.
15 He's not necessarily -- you've got the co-manager down. It
16 was the -- the issue of just making the alleged
17 misstatements, and we believe that the law is more clear on
18 that issue than it is on the ones that you have touched on,
19 that somebody in his position, who's not the maker of the
20 alleged misstatements and disgorgement, in particular, is not
21 appropriate for the type of compensation alleged. That's
22 really all I have to add.

23 THE COURT: Okay. Thank you. I appreciate that.
24 Who will be arguing for of SEC?

25 MR. BIRKENHEIER: Your Honor, I will.

1 John Birkenheier.

2 THE COURT: All right. What I'd like to do is do
3 the same thing, Mr. Birkenheier, that I did with Mr. Uretsky,
4 which is start with my questions and then I would be pleased
5 to hear any other point that you would like to make.

6 And the focus of my questions for you guys is
7 really on the 10(b)(5) claim here. Let me start with a broad
8 question that's not in the nature of a purely legal question,
9 and then get to the legal question.

10 The broad question is: If I were to deny the
11 motion with respect to all claims, other than the 10(b)(5)
12 claim, and dismiss the 10(b)(5) claim, does that really
13 matter to your case? You don't need him to be the maker in
14 order to hold him liable for what you claim were fraudulent
15 statements, right?

16 MR. BIRKENHEIER: I think, legally, that's probably
17 right, although I'm not -- to tell you the truth, I wasn't
18 anticipating that particular question, and I'm not sure -- I
19 would need time to think through all the implications of
20 losing the 10(b)(5) claim. But if I may, I'd like to point
21 one thing out, and that is that the maker argument or the
22 argument whether Mr. Shumake was a maker, only goes to one
23 part of the 10(b)(5) claim.

24 THE COURT: I'm sorry. You know what, I was -- my
25 question was not nearly as specific as it should be. What I

1 meant was, the 10(b)(5)(B) claim, the maker claim.

2 MR. BIRKENHEIER: Okay.

3 THE COURT: If I were to dismiss only
4 the 10(b)(5)(B) claim on the basis that he wasn't a maker,
5 you would still have plenty of other ways to seek to hold him
6 liable on the basis that he participated, to some degree, in
7 the promulgation of what you claim were false and misleading
8 statements, right?

9 MR. BIRKENHEIER: That's correct, Your Honor. I
10 am -- let me -- if I may, let me add, though, that there are
11 statements beyond -- or omissions and misleading statements
12 beyond his concealing his role. You know, he -- through the
13 offering statements. He personally interacted with Petrescu,
14 the principal of crowdfunding platform. He also communicated
15 with investors and drafts promotional materials. Now, your
16 complaint doesn't specify what the contents of those
17 communications are, but I would submit, in the context of
18 this memo, that the reasonable inference to be drawn in favor
19 of the SEC on this motion is that he did not disclose his
20 involvement in any of those personal communications that he
21 made.

22 THE COURT: Is -- I guess that's what I'm asking.
23 I didn't see in the complaint a specific connection between a
24 communication that he personally authored and a false
25 statement or an omission. You claim that certain statements

1 were misleading, and the ones that you talk about -- the ones
2 that you specifically identify, here, were in the offering
3 statements. And then you also say, you know, full stop, you
4 say there were other communications that he engaged in. You
5 do say in 43A, he directed un -- communications with current
6 and prospective investors, and you say he helped prepare
7 documents, but I didn't see an allegation that anything
8 beyond the offering statements were misleading.

9 Are you saying that if I allowed you to amend, you
10 could identify statements that he personally authored that
11 would satisfy the maker requirement in *Janus*?

12 MR. BIRKENHEIER: I would have to double check, but
13 I believe we could. I don't want to guarantee that right
14 now, Your Honor, but I think we could.

15 THE COURT: All right. Focusing only on what is
16 currently alleged here, would you identify for me the
17 allegations in the current complaint that you believe elevate
18 Mr. Shumake to the status of a maker, as defined under *Janus*.

19 MR. BIRKENHEIER: Yes, Your Honor. The -- you
20 know, this standard under *Janus* is that you have to have
21 control over the content and dissemination of the statement.
22 And the way that the offering statements, with regard to the
23 concealment of Mr. Shumake's role, came together is that in
24 that, Shumake spoke and agreed with both Birch, as to the
25 Transatlantic offering, and Jackson, as to the 420 offering,

1 that his role -- Shumake's role would not be disclosed
2 because it would hinder their fundraising capability or
3 success. And we allege that his agreement to conceal that
4 with Birch and with Jackson, gave -- gives him sufficient
5 control over the omission to render him a maker of the
6 statements that were ultimately made in the offering
7 statements. And then, he then was able to monitor what was
8 being said or not said about him, because drafts of the
9 offering statements were shown to him, sent to him as the
10 document progressed through the drafting stage.

11 THE COURT: What allegation do you want me to look
12 at that says what you just said?

13 MR. BIRKENHEIER: Bear with me just a moment,
14 Your Honor.

15 THE COURT: So, look, let me put a finer point on
16 it. If you start with paragraph 31 of the complaint, it says
17 that Birch, with Petrescu's assistance, wrote the form C in
18 the offering statement. So right out of the gate, you've got
19 a -- the *Janus* issue is teed up, because *Janus* says,
20 primarily the person that says it is the -- and writes it and
21 says it, I guess, is the maker. But that's -- that's not
22 dispositive. But then it says Birch and Petrescu kept
23 Shumake informed by copying him. That sentence -- keeping
24 somebody informed does not bespeak or suggest, to me, that
25 Shumake had control because he was kept informed.

1 And then the next sentence is, Birch, Shumake and
2 Petrescu also weighed in on the steps necessary to kick off
3 and promote the offering. That doesn't suggest control to
4 me.

5 Paragraph 32 says, Birch signed -- not dispositive,
6 but certainly doesn't suggest that Shumake had control.

7 Then paragraph 33 that talks about the concealment
8 is in the passive voice. It doesn't say Shumake controlled.

9 Paragraph 34 says, Shumake and Birch knew that the
10 disclosure could hinder fundraising. That doesn't say that
11 he controlled it or made an agreement.

12 MR. BIRKENHEIER: Your Honor, if I may? If we go
13 back a few paragraphs, paragraph 27, the last sentence reads
14 that, "Shumake also convinced Jackson to hide Shumake's
15 involvement in the 420 Real Estate offering.

16 THE COURT: All right. But, again, why does that
17 make him a maker? I think there's a lot of theories under
18 which he could be liable for that, but if you go back to
19 *Janus* and you talk about the speech writer, if you convince
20 me to make a decision today, it's still my decision, I have
21 control over it. If a board of advisors convinces an officer
22 of a company to make a decision or to make a statement, that
23 doesn't mean that a convincer is a maker.

24 MR. BIRKENHEIER: Your Honor, I think the best we
25 have is that Shumake agreed with Birch and then with Jackson,

1 that the offering statement would not reveal his role. So I
2 know that doesn't completely or satisfactorily address the
3 concern that you just raised, but I do think that's the best
4 we have as to the offering statements.

5 THE COURT: Okay. Is there anything else you would
6 like to say on any of the other points? I can tell you I
7 certainly understand your points on the rest of the claims,
8 and I'm not really one to hide the ball, you don't need to
9 say anything else on the other claims. The one I was
10 concerned about is the 10(b)(5)(B) claim. So you tell me
11 whatever you want, but --

12 MR. BIRKENHEIER: No, Your Honor. I have nothing
13 more to say on that.

14 THE COURT: Okay. All right. Does -- look, here
15 is what I'm going to do. I have read this stuff carefully, I
16 really appreciate the arguments. I'm going to grant the
17 motion in part and deny it in part. I'm going to grant it to
18 the extent that it seeks dismissal of the 10(b)(5)(B) claim,
19 because I think that the allegations, even when taken in
20 favor of the SEC, have not yet persuaded me that they rise to
21 the level of Mr. Shumake being a maker, as the Supreme Court
22 defined that term in the *Janus* decision. I'm going to deny
23 the motion in all other respects, but I am willing, if the
24 SEC wants, to grant leave to amend. Mr. Birkenheier
25 suggested that perhaps the SEC has additional information

1 that could allow it to put a finer point on these 10(b)(5)(B)
2 maker allegations, and even though this is a 2021 case, it's
3 still in the very early stages as to Mr. Shumake, because it
4 was assigned to my colleague who passed away, and there has
5 been a time lapse with COVID and all of that stuff. So would
6 the SEC like an opportunity to amend the 10(b)(5)(B) claim?

7 MR. BIRKENHEIER: Yes, Your Honor, with the
8 understanding that we may not do it, but --

9 THE COURT: Okay.

10 MR. BIRKENHEIER: -- I'd like the opportunity.

11 THE COURT: All right. So what I'm going to do is
12 grant the motion in part and deny it in part, along the
13 lines that I indicated. I will allow the SEC to file an
14 amended complaint to address the maker issue. How about we
15 say 21 days, Mr. Birkenheier? And at the end of the 21 days,
16 you either file the amended complaint or file a notice on the
17 docket that you are going to not file an amended complaint.
18 Once you do that, either way, if you file the amended
19 complaint, Mr. Uretsky will then figure out how he wants to
20 respond. If you file a notice saying you are not going to
21 file one, then we will tee up a quick scheduling order and
22 get this case out of the gate. Does that work for you,
23 Mr. Birkenheier.

24 MR. BIRKENHEIER: Yes, Your Honor, it does.

25 THE COURT: Mr. Uretsky, does that work for you?

1 MR. URETSKY: Yes, Your Honor, thank you.

2 THE COURT: All right. Mr. Birkenheier, anything
3 else for the SEC, while we are together this morning?

4 MR. BIRKENHEIER: No, sir.

5 THE COURT: Mr. Uretsky, anything else for you?

6 MR. URETSKY: No, nothing. Thank you.

7 THE COURT: All right. So I think the reasons that
8 I dismissed the 10(b)(5)(B) claim, I hope they're clear from
9 the record, that I don't believe there's is sufficient
10 allegations that Mr. Shumake had control over the statements,
11 as that concept is explained in *Janus*, so that will be my
12 reasoning.

13 I will just enter a short order that says, granted
14 in part and denied in part, along these lines, for the
15 reasons stated on the record, and that leave to amend has
16 been granted. I will put the schedule. I will look forward
17 to working with you folks as we move forward in the case.
18 Take care. Have a nice weekend. See you later.

19 MR. ROLAND: Thank you, Your Honor.

20 (Proceedings concluded at 10:03 a.m.)

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C E R T I F I C A T I O N

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of UNITED STATES SECURITIES AND EXCHANGE COMMISSION vs. ROBERT SAMUEL SHUMAKE, JR., Case No. 21-12193, on Friday, June 9, 2023.

s/Robert L. Smith

Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 07/13/2023
Detroit, Michigan